BRUNEI REPORTS

Yong Tze Kiok & Ors v Citibank NA

COURT OF APPEAL (BANDAR SERI BEGAWAN) — CIVIL APPEAL NO 7 OF 1989
DEREK CONS AG PRESIDENT, HUNTER AND BOKHARY COMMISSIONERS
20 NOVEMBER 1989

Banking — Guarantee — Second guarantee signed five years after first guarantee — Both guarantees made by the same parties — Whether it is a natural implication that second guarantee supersedes first guarantee — Express words of guarantee to be looked at

Banking — Guarantee — Claim of plaintiff bank based on guarantee — Defence that plaintiff had not fulfilled its obligation in guarantee to extend further loan — Whether guarantee does contain such obligation

This is an appeal by the defendants against the decision of the lower court whereby it entered judgment for the plaintiff bank. The plaintiff's claim is based upon two guarantees. The first guarantee, dated 1981, was signed by the first to fifth defendants; and the second guarantee, dated 1986, was signed by all seven defendants. In this appeal, the defendants contended that: (a) the 1986 guarantee superseded and replaced the 1981 guarantee. This replacement is a natural and necessary implication from the nature of the document itself, namely, that it is also a guarantee made between the same parties; (b) the plaintiff has not fulfilled its own obligations under the 1986 guarantee and land charge, in that it failed to lend a further $2m.

Held, dismissing the defendants' appeal:

(1) The express words of cl 8 of the 1986 guarantee have no room for any natural or necessary implication as contended by the defendants. In the face of those words, it is impossible to accept that the 1981 guarantee was in any way written off.

(2) There was no obligation, either in the land charge or the 1986 guarantee, on the plaintiff to lend to the principal debtor a further $2m. Instead, the operative words of the land charge stated 'in amount, duration and in all other respects to be determined and decided at the sole discretion of the bank'. The 1986 guarantee also does not mention any particular amount.

Lee Yew Choh for the appellants.
Susannah Lim for the respondent.

Cur Adv Vult

Derek Cons Ag President (delivering the judgment of the court): This is an appeal against the decision of the Chief Justice given on 19 August 1989, whereby he revised the earlier decision of the registrar which gave all defendants unconditional leave to defend and by which the Chief Justice instead entered judgment for the plaintiff bank in the sum of $5,550,347.

The bank's claim is based upon two guarantees. The first consisted of five simple documents, each respectively signed by the first to fifth defendants and dated 27 October 1981. The second, a more sophisticated document, is dated 27 September 1986 and is signed jointly by all seven defendants. In addition, although it is not pleaded by the bank, the first and the fourth defendants had in January of 1986 charged land in Miri in favour of the bank.

A formal defence was filed before the O 14 summons was heard. It has been in no way verified by oath or affirmation as is usual, and would be particularly expected in the present instance, where the allegations therein have at least something of the flavour of misrepresentation or fraud. The defence attacks the claim in two ways. Firstly, it alleges that the bank has not fulfilled its own obligations under the two 1986 documents. In particular, it suggests that the bank failed to lend a further $2m, that is, in addition to the $7.3m which we understand was then outstanding and covered by the 1981 guarantees. Secondly, it alleges that the bank obtained the 1986 guarantee by means of undue influence. There is, in addition, a counterclaim by the first and the fourth defendants for damages.

Mr Lee, who appears for all the defendants, raises the same two points in the appeal, but he concedes straightaway that the appeal must fail unless he can make good a preliminary premise that the 1986 guarantee superseded and replaced the five 1981 guarantees. The point does not relate to the two corporate defendants, one of whom is also the principal debtor and against whom we understand, judgment has already been entered. So from that one point of view the appeal is academic.

Mr Lee suggests that the substitution of the 1981 guarantee by the 1986 is a natural and necessary implication from the nature of the document itself, namely, that it is also a guarantee and made between the same parties. As to whether that is so or not we need express no conclusion, for the express words of the 1986 guarantee have no room for any natural or necessary implication. The relevant part of cl 8 reads:

> ... this guarantee and your (ie the bank's) right under it shall be in addition to ... any one or more other securities or guarantees for the principal which you may now or subsequently hold.

We find it impossible to accept, in the face of those words, that the 1981 guarantee was in any way written off. That point is sufficient effectively to dispose of the whole appeal. But in deference to counsel we should say that we see no merit in the two points specifically raised. Both of them depend ultimately upon being able to spell out from the land charge and from the 1986 guarantee an obligation on the bank to lend to the principal debtor a further $2m.

We are unable to find that obligation in either document. The operative words of the land charge are:

> ... that in consideration of Citibank at the chargor's request granting and continuing to grant accommodation by way of one or more banking facilities in amount duration and in all other respects to be determined and decided at the sole discretion of the bank from time to time which discretion

shall not in any way be fettered by any arrangement written otherwise made between the parties hereto or between the bank on the one part or any other third party on the other jointly or otherwise with the chargor or before the execution hereof up to an aggregate total amount not exceeding $2m only.

We would emphasize the words 'in amount duration and in all other respects to be determined and decided at the sole discretion of the bank'.

The words on which Mr Lee relies in the 1986 guarantee are as follows:

> In consideration of the forebearance by Citibank ... in not insisting on immediate payment of the sum now owing to the bank by the company and in consideration of your from time to time make, (we think they mean making) or continuing loans or advances to or coming under liabilities or discounting bills...

and then follow many other ways in which banks are accustomed to make facilities available, but there is no mention of any particular amount.

Mr Lee suggests that the consideration in the guarantee should be read conjuntively so as to oblige the bank to comply with each and every one of them. And as far as 'making loans' is concerned, that should be taken together with the land charge and imply a positive obligation to lend $2m. We think that one needs only to read out, as we have, the relevant portions of these two documents to show clearly that this argument is misconceived and must inevitably fail.

Mr Lee asks that, should we be minded to dismiss the appeal, we consider staying the execution of the judgment upon the claim pending the result of the counterclaim by the first and the fourth defendants, which technically remains in being. We are not prepared to make that order, the issues in the counterclaim are the same as those in the claim and depend likewise upon the defendants' being able to establish upon the bank an obligation to lend a further $2m. In our view the counterclaim, if pursued at all, must inevitably fail.

For these reasons, the only order that we make is that the appeal shall be dismissed with costs.

Appeal dismissed.

Clidero & Lee; Susannah Lim & Co.

Reported by *Ng Sheau Jiuan*

Tay Swee Sen v Goh Chio Tee

COURT OF APPEAL (BANDAR SERI BEGAWAN) — CIVIL APPEAL NO 2 OF 1989
DEREK CONS AG PRESIDENT, HUNTER AND BOKHARY COMMISSIONERS
15 NOVEMBER 1989

Negotiable Instruments — Dishonoured cheques — Cheque given to plaintiff as some form of security in loan transaction — Fraud or duress not established — Defence of illegality of tontine — Plaintiff's claim not reliant on tontine arrangement — Action upon negotiable instruments confer sufficient rights

The plaintiff's claim was based upon two cheques, for $5,000 and $95,000 respectively, drawn by the defendant in the plaintiff's favour but which were dishonoured upon presentation. The plaintiff appealed against the decision of the lower court whereby it set aside a default judgment given earlier in favour of the plaintiff. In the affirmations filed by the defendant, there seemed to be the suggestion of a $100,000 loan to L from which the plaintiff was to receive interest at 8%, of which 3% would be given to the defendant. The cheque for $5,000 was said to be the balance due to the plaintiff upon one particular month's payment of interest. The cheque for $95,000 was said to have been originally handed over in blank for 'safe keeping' and only subsequently filled in by the plaintiff for that amount. The defence strongly suggested fraud with regard to the $95,000 cheque and duress as to the cheque for $5,000. The other defence raised was that of illegality of the tontine by which the plaintiff was said to have raised money for the loan, using her husband's business name to conceal her own identity.

Held, allowing the plaintiff's appeal:

(1) Whether the loan of $100,000 was made to the defendant for the benefit of L or whether it was made to him directly, the blank cheque signed by the defendant was given to the plaintiff as some form of security. In those circumstances, the court sees no possible defence to the claim thereon, nor has duress been made out as to the other cheque.

(2) The defendant's point on illegality could be of no benefit to the defendant. Firstly, she was an equal party to the tontine and to any illegality that followed, by reason of the membership of her husband on her behalf. Secondly, the action brought by the plaintiff does not, and does not need to, rely in any way upon it. It is an action upon negotiable instruments, which of themselves confer sufficient rights upon her as the holder.

Angking Embah for the plaintiff/appellant.
Defendant/respondent in person.

Cur Adv Vult

Derek Cons Ag President (delivering the judgment of the court): This is an appeal against the decision of Nazareth J, whereby he set aside a default judgment given earlier in favour of Madam Tay Swee Sen ('the plaintiff') and instead gave leave to defend to Madam Goh Chio Tee ('the defendant'). The leave was conditional upon payment into court of $7,000 which we understand has been done.

The plaintiff's claim is based upon two cheques, respectively for $5,000 and $95,000, both drawn by the